Supreme Court, U.S.
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In The

Supreme Court of the United States

MAXINE CAMERON-GRANT, ROSS BASIL, FELESHIA TISSIERA and VELDA A. FREDERICK,

Petitioners,

v.

MAXIM HEALTHCARE SERVICES, INC., a Foreign corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee who settles their individual Fair Labor Standards Act claim in a suit filed on behalf of other employees, has a separate claim or right to pursue the case on behalf of other employees similarly situated, and may appeal the trial court's denial of a motion to permit court supervised notice to other employees and to proceed as a collective action under 29 U.S.C. § 216(b)?

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OPINION BELOW

The Eleventh Circuit Court of Appeals selected its opinion for publication. The decision is reported at 347 F.3d 1240 (2003). The District Court issued a written order in this case. It is reprinted in the Appendix at pp. 17-24.

JURISDICTION

The Eleventh Circuit filed its decision on October 20, 2003, and entered an order denying petitioners' motion for rehearing En Banc on December 24, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

29 U.S.C. § 216(b)

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceeding sentences may be maintained against any employer

(including a public agency) in any federal or state court of competent jurisdiction by any one or more employees for or in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgement awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of the unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this sub-section or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

STATEMENT OF THE CASE

Petitioners are nurses who worked for Maxim Healthcare Services, Inc, a nationwide company. They filed a complaint on behalf of themselves and others similarly situated alleging that Maxim failed to pay them overtime. When they worked more than forty (40) hours Maxim reduced the agreed hourly rate and paid time and one half the reduced rate. The more hours of overtime, the greater their regular rate would be reduced. This resulted in

straight time pay for all hours worked. The District Court has federal question jurisdiction pursuant to 29 U.S.C. § 216(b).

Maxim's regional controller testified that he had management responsibilities for billing throughout Florida, Georgia, South Carolina, Alabama, Tennessee, Louisiana and Arkansas, that the same payroll system is used throughout the entire southeast region and that the regular rates are negotiated daily and weekly. Petitioners stated that Maxim reduced the hourly rate solely to avoid paying proper overtime.

The petitioners filed a motion to proceed as a collective action under 29 U.S.C. § 216(b) and sought an order permitting court supervised notice to employees of their opt-in rights. Three of the four petitioners, Maxine Cameron-Grant, Feleshia Tissiera, and Velda Frederick settled their individual claims and filed a stipulation for dismissal with prejudice. Subsequently, Respondent Maxim stipulated to paying petitioner Basil's claims for unpaid wages and overtime pay. Basil had an FLSA retaliation claim pending.

The District Court then denied the motion to allow notification to potential opt-in plaintiffs and to proceed as a collective action. The District Court concluded that there were other employees who were similarly situated with respect to their job requirements and pay provisions and that there was a company wide policy of changing hourly rates on a weekly basis. However, it held that prior to permitting court supervised notice to other employees, Petitioner Basil had to submit an affidavit or file a consent to join from a non-party employee to establish that there were other employees who desired to opt in the pending

case. Petitioner Basil filed for re-hearing stating that such a requirement puts the cart before the horse, and defies the purpose of court supervised notice and the remedial provisions of the FLSA. The court denied re-hearing. Petitioner Basil and Respondent Maxim agreed to the dismissal of Basil's remaining retaliation claims.

Basil appealed to the Eleventh Circuit pursuant to 28 U.S.C. § 1291. The Eleventh Circuit stated that Petitioner Basil raised an issue of first impression, namely "whether a District Court's denial of a motion to notify potential opt-in plaintiffs under section 216(b) of the FLSA may be reviewed on appeal after the named plaintiff's personal claims have become 'moot' ". The court held that Basil had no remaining personal claims and therefore, dismissed the appeal as moot. Thus, the Eleventh Circuit did not explicitly reach the underlying issue as to whether the trial court erred in denying the motion to proceed as a collective action and permitting notice to potential opt in plaintiffs. However, the Eleventh Circuit implied that the District Court erred in not granting conditional certification and thereby giving notice and the opportunity to opt in to putative class members. *Maxine Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240,1243 fn2 (11th Cir. 2003).

The Eleventh Circuit also noted that this Court has never addressed this issue. In *Geraghty*, this Court specifically left open the question of "whether a named plaintiff who settles the individual claim after denial of class certification" has a personal stake to appeal the denial of class certification. 445 U.S. at 404 n.10. In the context of a Rule 23 class action however, the Eleventh Circuit has addressed this issue and has concluded that the named plaintiff who settles his claim still has a separate right to

appeal denial of class certification. In *Love v. Turlington*, 733 F.2d 1562,1565 (11th Cir. 1984), the Eleventh Circuit held that there was no meaningful distinction between the settlement of the individual claim by Ms. Love and the expiration of the claim in *Geraghty* for purposes of the ability of the named plaintiff to pursue an appeal of the denial of certification. They held that a dispute capable of judicial resolution continued to exist with regard to the class certification issue in that case.

However, in the case at bar, the Eleventh Circuit attempted to distinguish collective actions under section 216(b) of the FLSA from a Rule 23 class action. The Eleventh Circuit held that "the structure of Rule 23 reflects that the named plaintiff has a claim that he is entitled to represent a class", whereas under section 216(b), the named plaintiff does not have a separate right or claim that he is entitled to represent other plaintiffs.

The Eleventh Circuit also quoted extensively from *Arrington v. National Broadcasting Co., Inc.*, 531 F.Supp. 498 (D.C. 1982). In the petition for rehearing En Banc, petitioner Basil stated that the Eleventh Circuit misread that case and the quotations therein from Senator O'Donnell who explained the rationale behind the 1943 Portal to Portal Act amendments barring unions from bringing representative actions under the FLSA. Senator O'Donnell noted there were two types of actions permitted by section 16(b). One was a suit by one or more employees for themselves and all others similarly situated – a collective action. The second was a suit by an agent or a representative who may not be an employee of the company at all – a representative action. Thus the amendment to the FLSA barred unions from bringing a representative action under the FLSA. The right of an employee to bring a

collective action on behalf of other employees remained intact.

The Eleventh Circuit's decision is contrary to congressional intent, the remedial purpose of the FLSA and decisions of this Court. In *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), this Court noted "the private-public character" of FLSA rights and noted that as originally enacted, the Secretary of Labor had no right to bring an action at law. "The sole right to bring such suit was vested in the employee under section 216(b)" O'Neil, 324 U.S. at 709-10. This Court also quoted Representative Kellar's speech from the Congressional Record when section 16(b) was first incorporated into the FLSA of 1938. Representative Kellar stated: "If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them. . . . " *O'Neil*, 324 U.S. at 706 n.16.

Moreover, Congress explicitly provided for the distinct right of an employee to bring a collective action on behalf of other employees. 29 U.S.C. section 216(b) states "*an action* to recover the liability prescribed . . . *may be maintained* against any employer . . . *by any one or more employees for* and in behalf of himself or themselves and other employees similarly situated" and refers to "*the right* provided by this sub-section *to bring an action* by or *on behalf of any employee*. . . . " (emphasis ours)

REASONS FOR GRANTING THE PETITION

This Court should address the legal issue presented because not only does it have a specific impact on the

petitioners and all potential opt-in plaintiffs in Florida, Georgia, South Carolina, Alabama, Tennessee, Lousiana and Arkansas, it is of national importance because it will affect every potential opt-in plaintiff in every Fair Labor Standard Act case filed in the United States, and the issue has not been, but should be, decided by this Court.

In *United States Parole Comm. v. Geraghty*, 445 U.S. 388(1980) this Court held that an action brought on behalf of a class pursuant to Rule 23 does not become moot upon expiration of the named plaintiff's substantive claim even though class certification has been denied. That proposed representative has a personal stake in obtaining certification sufficient to ensure that Article III values are not undermined. This Court specifically stated "We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification." *Geraghty*, 445 U.S. at 404 n.10. Moreover, this Court has never addressed that issue in the context of a collective action under the Fair Labor Standards Act.

Congress enacted the Fair Labor Standards Act of 1938 *after* the adoption of Federal Rule of Civil Procedure 23. That Congress, after the adoption of Rule 23, enacted a specific statute permitting employees to bring a civil lawsuit for back pay and overtime for all employees similarly situated shows the importance Congress has given to this right to assert a collective claim. The Eleventh Circuit's holding that "in contrast to the Rule 23 plaintiff, a § 216(b) plaintiff has no claim that he is entitled to represent other plaintiffs" is error and creates dangerous precedent requiring action by this Court.

In *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980) this Court stated:

> a district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover, it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement. *It would be in the interests of a class-action defendant to forestall any appeal of denial of class certification if that could be accomplished by tendering the individual damages claimed by the named plaintiffs.* Permitting appeal of the district court's certification ruling – either at once by interlocutory appeal, or after entry of judgment on the merits – also minimizes problems raised by "forum shopping" by putative class representatives attempting to locate a judge perceived as sympathetic to class actions. (Emphasis ours)

Roper, 445 U.S. at 339-340

This Court's reasoning in *Roper* is applicable to collective actions under the FLSA where the defendant tenders to the named plaintiff complete payment of past wages and attorney's fees. Moreover, ethically, every attorney must convey to their client offers made by a defendant. An attorney cannot stymie the settlement solely to preserve

the right to appeal a denial of a motion to proceed as a collective action. Practically, why should plaintiffs throughout the United States be required to reject fair offers of settlement of their underlying claim merely to preserve their right to appeal? These are the dilemmas the Eleventh Circuit's decision creates not only to the potential opt in plaintiffs in the southeast region of the United States in the case at bar, but to all potential plaintiffs in FLSA claims filed in the United States on behalf of other employees similarly situated.

If this court does not address this issue, the Eleventh Circuit's decision becomes the only controlling case on this point, which will lead to multiple plaintiffs bringing separate actions, encourage forum shopping, frustrate the objectives of collective actions under the FLSA and invite a waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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347 F.3d 1240

United States Court of Appeals,
Eleventh Circuit.

Maxine CAMERON-GRANT, Feleshia Tissiera,
Velda A. Frederick, Plaintiffs,
Ross Basil, Plaintiff-Appellant,
v.
MAXIM HEALTHCARE SERVICES, INC.,
a Foreign corporation, Defendant-Appellee.

No. 03-11546.

Oct. 20, 2003.

Joseph Bilotta, Lake Worth, FL, for Plaintiff-Appellant.

Jeffrey P. Watson, Patrick D. Coleman, Coffman, Coleman, Andrews & Grogan, P.A., Jacksonville, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HULL, MARCUS and STAHL,* Circuit Judges.

PER CURIAM:

Plaintiff-appellant Ross Basil was one of four plaintiffs who brought this action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, on behalf of themselves as well as "similarly situated" employees. This appeal raises the question whether Basil, whose personal

* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

claims are settled and now moot, may appeal the district court's order denying his motion to notify other potential plaintiffs of this FLSA action. After review and oral argument, we determine that this action is moot.

I. BACKGROUND

On April 12, 2002, plaintiff-appellant Ross Basil, and plaintiffs Maxine Cameron-Grant, Feleshia Tissiera, and Velda A. Frederick, brought this action against defendant-appellee Maxim Healthcare, Inc. ("Maxim") under the FLSA, 29 U.S.C. § 201 *et seq.* The plaintiffs filed this action "on behalf of themselves and other similarly situated employees," seeking to recover unpaid back wages, unpaid overtime compensation, an additional equal amount as liquidated damages, and reasonable attorneys' fees and costs.

According to the complaint, Defendant Maxim provides healthcare services to adults. At various times, Maxim employed the four named plaintiffs, who are nurses that rendered nursing services on Maxim's behalf. The complaint alleges that the four named plaintiffs sometimes worked longer than forty hours per week and that Maxim failed to compensate them for their work in excess of forty hours per week at a rate of at least one and one-half (1-1/2) times the regulated rate at which they were employed, in violation of 29 U.S.C. § 207. The complaint also alleges that Maxim failed to pay the plaintiffs the applicable minimum hourly rate, in violation of 29 U.S.C. §§ 206 and 215(a)(2), and that Maxim retaliated against the plaintiffs after they complained about not receiving back pay or overtime compensation.

On September 27, 2002, the four named plaintiffs filed a motion for an order permitting court supervised notice to employees of their opt-in rights. The plaintiffs sought permission from the district court to proceed as a "collective action" under 29 U.S.C. § 216(b),[1] asserting that they "know that their claims are typical of the claims of other employees of the defendant and are typical of the claims of all members of the representative class."[2] *See* 29 U.S.C. § 216(b).

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[1] Section 216(b) of the FLSA provides, in pertinent part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

[2] In *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208 (11th Cir.2001), this Court specifically considered collective actions brought under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621-34. *Hipp*, 252 F.3d at 1214-15. However, the *Hipp* analysis is relevant to FLSA collective actions because "[p]laintiffs wishing to sue as a class under ADEA must utilize the opt-in class mechanism provided in 29 U.S.C. § 216(b) instead of the opt-out class procedure provided in Fed.R.Civ.P. 23." *Hipp*, 252 F.3d at 1216 (citation omitted).

Hipp outlined a two-tiered procedure that district courts should use in certifying collective actions under § 216(b), stating as follows:

> The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision – usually based only on the pleadings and any affidavits which have been submitted – whether notice of the action should be given to potential class members.

(Continued on following page)

On January 9, 2003, three of the four named plaintiffs, Maxine Cameron-Grant, Feleshia Tissiera, and Velda Frederick, filed a stipulation for dismissal with prejudice of "all of their . . . claims and causes of action in the above-styled case, in their entirety." The district court accepted the dismissal of their claims.

On January 22, 2003, Maxim stipulated to paying the fourth plaintiff's, appellant Basil's, claims for unpaid wages and overtime pay. Basil had other claims pending.

On February 6, 2003, the district court denied the plaintiffs' motion to allow notification to potential opt-in

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> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.
>
> The second determination is typically precipitated by a motion for "decertification" by the defendant usually filed after discovery is largely complete and the matter is ready for trial. At this stage, the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives – i.e. the original plaintiffs – proceed to trial on their individual claims.

Id. at 1218 (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir.1995) (internal footnote omitted)). Since *Hipp,* the district courts in our circuit have utilized the two-tiered approach described above. *See, e.g., Reed v. Mobile County Sch. Sys.*, 246 F.Supp.2d 1227, 1230 (S.D.Ala.2003); *Barron v. Henry County Sch. Sys.*, 242 F.Supp.2d 1096, 1102 (M.D.Ala.2003); *Stone v. First Union Corp.*, 216 F.R.D. 540, 544-46 (S.D.Fla.2003).

plaintiffs. In analyzing the plaintiffs' motion, the district court applied the two-part test set forth in *Dybach v. State of Florida Department of Corrections,* 942 F.2d 1562 (11th Cir.1991). In *Dybach,* this Court stated that the district court, before exercising its power to give notice to other potential members of the plaintiff class to "opt-in" to the lawsuit, "should satisfy itself that there are other employees of the department-employer who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Id.* at 1567-68. The district court concluded that "the affidavits and deposition transcripts provided by Plaintiffs are sufficient to satisfy this Court that there are other employees of Defendant who are similarly situated with respect to their job requirements and with regard to pay provisions." However, the district court also found that the plaintiffs failed to set forth evidence that any employees desired to opt-in to the lawsuit.

After the denial of this motion, plaintiff Basil and defendant Maxim agreed to the dismissal of Basil's remaining claims – leaving no claims pending against Maxim. Thus, on March 5, 2003, the district court issued an order entering final judgment on Maxim's stipulation that it would pay some of Basil's claims and that his other claims would be dismissed. According to the order and stipulated final judgment, Maxim specifically "agreed to pay, and now has fully paid [Basil] all claimed unpaid wages and overtime pay, liquidated damages equal to that amount, and [Basil]'s costs and attorneys' fees." The order also stated that "[a]ll other claims in this case have been dismissed with prejudice."

Plaintiff Basil now appeals the district court's order denying the motion to allow notification to potential opt-in

plaintiffs. Because Basil has settled some of his claims with Maxim, agreed to dismissal of the remainder of his claims, and even recovered his costs and attorneys' fees, we first must consider whether this action is moot.

II. DISCUSSION

This appeal raises an issue of first impression: whether a district court's denial of a motion to notify potential opt-in plaintiffs under § 216(b) of the FLSA may be reviewed on appeal after the named plaintiff's personal claims have become "moot."

The general rule is that settlement of a plaintiff's claims moots an action. *See Lake Coal Co. v. Roberts & Schaefer Co.,* 474 U.S. 120, 106 S.Ct. 553, 554, 88 L.Ed.2d 418 (1985); *Hammond Clock Co. v. Schiff,* 293 U.S. 529, 530, 55 S.Ct. 146, 79 L.Ed. 639 (1934). In the Rule 23 class action context, however, unique mootness principles may apply – when the named plaintiff seeks to have a class certified, the class certification is denied, and his personal claims subsequently become moot – to permit the named plaintiff to appeal the denial of class certification. *See, e.g., United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980); *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980); *Love v. Turlington,* 733 F.2d 1562 (11th Cir.1984). In this case, we consider whether the mootness principles in the Rule 23 class action context apply to collective actions brought under § 216(b) of the FLSA.

A. Mootness/Personal Stake and Rule 23 Class Actions

As required by Article III of the Constitution the exercise of judicial power by federal courts "depends upon

the existence of a case or controversy." *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971) (internal quotation marks omitted); *31 Foster Children v. Bush,* 329 F.3d 1255, 1263 (11th Cir.2003), *petition for cert. filed,* 72 U.S.L.W. 3171 (U.S. Sep. 2, 2003) (No. 03-351). "A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *31 Foster Children,* 329 F.3d at 1263 (internal quotation marks and citation omitted). More specifically, a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969); *31 Foster Children,* 329 F.3d at 1263.

The "legally cognizable interest" or "personal stake" requirement derives from Article III's case or controversy limitation, which restricts the jurisdiction of federal courts "to disputes capable of judicial resolution." *Geraghty,* 445 U.S. at 396, 100 S.Ct. at 1208. "The 'personal stake' aspect of mootness doctrine [] serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving." *Id.* at 397, 100 S.Ct. at 1209.

In two cases decided on the same day, *United States Parole Commission v. Geraghty,* 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), and *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), the United States Supreme Court discussed whether the named plaintiff, whose personal claims became moot after the denial of class certification under Rule 23, had a personal stake in appealing that denial. In *Geraghty,* the plaintiff prisoner challenged the parole release guidelines, but his substantive claims

became moot because he was released from prison.[3] In *Roper,* the plaintiffs challenged the usurious interest rates of the defendant bank, which tendered to plaintiffs the maximum amounts, including interest and costs, that could be recovered. Although the *Roper* plaintiffs refused the tender, the district court entered judgment for the defendant bank over plaintiffs' objection, which mooted their substantive claims.

In *Geraghty,* the Supreme Court concluded that the named plaintiff in a Rule 23 class action may have a "personal stake" in the class certification claim in one of two ways. *See Geraghty,* 445 U.S. at 402, 100 S.Ct. at 1212. First, the named plaintiff may retain, in some cases, a "legally cognizable interest" in the "traditional sense." *See id.* (citing *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969)). For example, the named plaintiff who retains an "economic interest" in the class certification question continues to have a personal stake in the action. *See Roper,* 445 U.S. at 336-37, 100 S.Ct. at 1173. In *Roper,* the Supreme Court recognized that an economic interest could include the named plaintiff's continuing individual interest in shifting the costs of litigation to the entire class. *Id.*

In this case, plaintiff Basil does not argue that he has an "economic interest" in appealing the district court's order. Here, the parties agreed to a settlement of some of Basil's claims and the dismissal of his other claims. Thus,

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[3] As stated in *Geraghty,* the plaintiff "was mandatorily released from prison; he had served 22 months of his sentence, and had earned good-time credits for the rest." *Geraghty,* 445 U.S. at 394, 100 S.Ct. 1202.

in light of the parties' settlement agreement, Basil has no costs or attorneys' fees that he can shift to other members of the putative class. *See id.*

Having no economic interest in this appeal or any other legally cognizable interest in the "traditional sense," plaintiff Basil's only recourse is to argue that as a named plaintiff in a § 216(b) collective action, he has a "personal stake" in the second manner identified by the Supreme Court in *Geraghty* – i.e., that the named plaintiff may continue to have a personal stake in the class certification claim that derives from the unique nature of the Rule 23 class action mechanism, as discussed *infra*.

In discussing how the named plaintiff might have a personal stake in the class certification claim, the Supreme Court in *Geraghty* and *Roper* first examined the purposes underlying the creation of Rule 23. In *Roper,* the Supreme Court explained that the "aggregation of individual claims in the context of a classwide suit [under Rule 23] is an evolutionary response to the existence of injuries unremedied by the regulatory action of government." *Roper,* 445 U.S. at 339, 100 S.Ct. at 1174. The *Roper* Court stated that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Id.* In *Geraghty,* the Supreme Court added that the Rule 23 class action mechanism was developed to accommodate varying types of interests, including "the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among

numerous litigants with similar claims." *Geraghty,* 445 U.S. at 402-03, 100 S.Ct. at 1212.

To achieve the primary benefits of class suits, as stated above, the *Geraghty* Court stated that "the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met." *Id.* at 403, 100 S.Ct. at 1212. In essence, the named plaintiff who seeks to represent a class under Rule 23 acts in a role that is "analogous to the private attorney general." *See id.; Roper,* 445 U.S. at 338, 100 S.Ct. at 1174 (stating that class actions represent an "increasing reliance on the 'private attorney general' for the vindication of legal rights").

Thus, the *Geraghty* Court stated that, in the Rule 23 context, the named plaintiff "presents two separate issues for judicial resolution. One is the claim on the merits; *the other is the claim that he is entitled to represent a class.*" *Geraghty,* 445 U.S. at 402, 100 S.Ct. at 1211 (emphasis added); *Love,* 733 F.2d at 1565. In other words, the named plaintiff has a "procedural . . . right to represent a class" that is independent of his substantive claims. *Geraghty,* 445 U.S. at 402, 100 S.Ct. at 1212. The denial of a motion to certify a class under Rule 23 is "an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment." *Roper,* 445 U.S. at 336, 100 S.Ct. at 1173.

The *Geraghty* Court noted, however, that a legally cognizable interest "in the traditional sense rarely ever exists with respect to the class certification claim." *Geraghty,* 445 U.S. at 402, 100 S.Ct. at 1212 n. 19. To ensure that the procedural right is appealable (and to effectuate the purposes of class action suits under Rule 23), the

Geraghty Court stated that the named plaintiff nevertheless has a personal stake in the class certification claim so long as "[t]he imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and [there are] self-interested parties vigorously advocating opposing positions." *Id.* at 403, 100 S.Ct. at 1212.

In *Geraghty,* the Supreme Court explicitly left open the question "whether a named plaintiff *who settles the individual claim* after denial of class certification" has a personal stake to appeal the denial of class certification. 445 U.S. at 404 n. 10, 100 S.Ct. at 1212 (emphasis added). Since *Geraghty,* however, this Court has concluded that the rule in *Geraghty* also applies when the named plaintiff settles his claims. *Love,* 733 F.2d at 1565 (stating that there was "no meaningful distinction between the settlement of the claim here at issue and the expiration of the claim in *Geraghty* for purposes of the ability of the named plaintiff to pursue an appeal of the denial of certification").[4]

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[4] *See Martinez-Mendoza v. Champion Int. Corp.,* 340 F.3d 1200, 1215-16 (11th Cir.2003) (stating that "a plaintiff's capacity to act as representative of the class is not ipso facto terminated when he loses his case on the merits. *See Satterwhite v. City of Greenville,* 634 F.2d 231 (5th Cir. Jan.1981) (en banc); *Armour v. City of Anniston,* 654 F.2d 382 (5th Cir. Unit B Aug.1981) (per curiam); *see also Armstrong v. Martin Marietta Corp.,* 138 F.3d 1374, 1383 n. 16 (11th Cir.1998) (en banc) (noting that in some cases the named plaintiff may appeal a denial of class certification even if she ceases individually to have a controversy with the defendant)").

B. Collective Actions Under FLSA § 216(b)

The pertinent question in this case, then, is whether the named plaintiff in a § 216(b) action under the FLSA has the right to represent other plaintiffs – that is, whether the named plaintiff has a procedural right analogous to the right provided for by Rule 23 in which the plaintiff can have a personal stake.

In analyzing this question, we begin by looking to the purposes of § 216(b). Section 216(b) of the FLSA provides, in pertinent part, that:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.*

29 U.S.C. § 216(b) (emphasis added). The provisions of § 216(b) are derived in substantial part from the Portal to Portal Act of 1947, pt. IV, § 5, 61 Stat. 84, 87, 88 (1947). *See United Food & Commercial Workers Union v. Albertson's, Inc.*, 207 F.3d 1193, 1200 (10th Cir.2000); *see also LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287 n. 6 (5th Cir.1975).[5]

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

In 1947, Congress enacted the Portal to Portal Act "in response to a 'national emergency' created by a flood of suits under the FLSA aimed at collecting portal-to-portal pay allegedly due employees." *Arrington v. Nat'l Broad. Co.,* 531 F.Supp. 498, 500 (D.D.C.1982); *see also Albertson's,* 207 F.3d at 1200-01 (noting that *Arrington*'s interpretation of Congress's intent in enacting the Portal-to-Portal Act has been embraced by almost all courts confronting the issue in published opinions). Congress amended the FLSA to limit the parties who could bring suit under that statute. *See State of Nevada Employees' Ass'n v. Bryan,* 916 F.2d 1384, 1391 (9th Cir.1990) (citing 61 Stat. 87). Specifically, § 216(b) was amended to provide that "standing to pursue an action for liability is statutorily limited to employees only." *Albertson's,* 207 F.3d at 1200. By identifying "employees" as the only proper parties in a § 216(b) action, the Portal to Portal Act aimed to ban representative actions that previously had been brought by unions on behalf of employees. *Id.* (stating that the ban was aimed "'at a fear that unions, as representatives, were concretely benefitting from participation in the FLSA suits'") (quoting *Arrington,* 531 F.Supp. at 502 n. 8).

While employees still may sue on behalf of other employees under § 216(b), the 1947 amendments did restrict their rights in one important respect. The 1947 amendments added an "opt-in" provision, which provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b); *see also La-Chapelle,* 513 F.2d at 287 & n. 6. Congress's aim in adding the "opt-in" language to § 216(b) was to "'prevent[] large group actions, with their vast allegations of liability, from

being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit.'" *Albertson's,* 207 F.3d at 1200 (quoting *Arrington,* 531 F.Supp. at 501). "The 'consent in writing' requirement . . . [sought] to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party's action in filing suit." *Arrington,* 531 F.Supp. at 502. Thus, the 1947 amendments to the FLSA prohibit what precisely is advanced under Rule 23 – a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members.

This distinction between § 216(b) collective actions and Rule 23 class actions is further reflected by the manner in which the two actions are structured. In a Rule 23 proceeding, the named plaintiff describes the class. *LaChapelle,* 513 F.2d at 288. If the district court determines that the described class meets the requirements of subdivision (a) and either subdivision (b)(1), (b)(2), or (b)(3) of Rule 23, the class comes into being and "each person within the description is considered to be a class member." *Id.* The existence of a class under Rule 23, therefore, does not depend in theory on the participation of other class members. Irrespective of whether other class members take any or no role in the action, they are bound by the judgment, whether favorable or unfavorable, unless they affirmatively "opt out" of the suit.[6] Thus, the structure of

[6] "More correctly, class members may opt out only when the action is maintainable under subdivision (b)(3) of Rule 23. When either subdivision (b)(1) or (b)(2) applies, the rule does not allow a class member to avoid the effect of judgment by disassociating himself from the suit." *LaChapelle,* 513 F.2d at 288 n. 7; Fed.R.Civ.P. 23.

Rule 23 reflects that the named plaintiff has a claim that "he is *entitled to represent a class.*" *See Geraghty,* 445 U.S. at 402, 100 S.Ct. at 1211 (emphasis added).

In light of the history underlying the amendments to the FLSA, it is not surprising that § 216(b) is a fundamentally different creature than the Rule 23 class action. Even if the § 216(b) plaintiff can demonstrate that there are other plaintiffs "similarly situated" to him, *see* 29 U.S.C. § 216(b), he has no right to represent them. Under § 216(b), the action does not become a "collective" action unless other plaintiffs affirmatively opt into the class by giving written and filed consent. *See LaChapelle,* 513 F.2d at 288. Until such consent is given, "no person will be bound by or may benefit from judgment." *Id.* Thus, in contrast to Rule 23 class actions, the existence of a collective action under § 216(b) does depend on the active participation of other plaintiffs. In other words, under § 216(b), the named plaintiff does not have the right to act in a role analogous to the private attorney general concept.

Considering the "fundamental, irreconcilable difference" between § 216(b) and Rule 23, *see LaChapelle,* 513 F.2d at 288, we conclude that a § 216(b) plaintiff, like Basil, presents only a claim on the merits. In contrast to the Rule 23 plaintiff, a § 216(b) plaintiff has no claim that he is entitled to represent other plaintiffs.[7] Accordingly, because Plaintiff Basil has no remaining personal claims, this action is moot.

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[7] Because Basil has no personal stake in this appeal, we need not consider whether the controversy is "live." *See Powell,* 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969).

III. CONCLUSION

For the reasons stated above, we dismiss this appeal as moot.

APPEAL DISMISSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-80326-CIV-MARRA

MAXINE CAMERON-GRANT, ROSS BASIL, FELESHIA TISSIERA and VELDA FREDERICK,

Plaintiffs,

vs.

MAXIM HEALTHCARE SERVICES, INC.,

Defendant.
_____/

ORDER DENYING MOTION TO ALLOW NOTIFICATION TO POTENTIAL OPT-IN PLAINTIFFS and ORDER DENYING MOTIONS TO STRIKE

(Filed Feb. 6, 2003)

THIS CAUSE is before the Court upon Plaintiffs' Motion for an Order Permitting Court Supervised Notice to Employees of their Opt-in Rights [DE 19], Defendant's Motion to Strike [DE 35] and Defendant's Motion to Dismiss, or Alternatively to Strike Motion for an Order Permitting Court Supervised Notice as Moot [DE 43]. The Court has carefully considered the motions, and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiffs' complaint asserts a claim for unpaid overtime under the Fair Labor Standards Act, 29 U.S.C. §216, ("FLSA") for four employees who were employed as health care workers for defendant Maxim Healthcare Services,

Inc. Plaintiffs allege that they and other similarly situated current and former non-exempt employees worked the number of hours required of them, many times in excess of forty (40) hours per week, but were not paid overtime for those hours. Plaintiffs further allege that Defendant used a system of changing rates of pay to deny overtime. Plaintiffs contend that Defendant reduced their regular hourly rate during periods when more than forty hours a week were worked by that employee. The Complaint further alleges retaliation claims under the FLSA by Plaintiffs Maxine Cameron-Grant (Count II) and Ross Basil (Count IV).

On January 9, 2003, Plaintiffs Maxine Cameron-Grant, Feleshia Tissiera and Velda Frederick filed a stipulation for dismissal with prejudice "of all of their (referenced Plaintiffs) claims and causes of action in the above-styled case, in their entirety. . . . " [DE 39]. The Court accepted this dismissal [DE 39]. The claims of Plaintiff Ross Basil remained pending. On January 22, 2003, in the parties' joint pretrial stipulation, Defendant stipulated to paying Ross Basil's claim for overtime wages in Count III of the Complaint [DE 41]. On January 31, 2003, Defendant moved to dismiss as moot the pending motion of Plaintiffs to allow court supervised notification to all potential opt-in plaintiffs as authorized by the FLSA, since all claims for failure to pay overtime had been resolved. Plaintiff Basil opposes the motion. The Court record contains no other consents to become a party plaintiff by any other current or former employee of Defendant

II. DISCUSSION

A. Mootness of Motion for Notification

Defendant asserts that remaining Plaintiff Basil's motion to allow notification to other potential opt-in class members is moot, given the dismissal of three Plaintiffs and the stipulation by Defendant to pay the overtime damages claimed by the only remaining Plaintiff, Ross Basil. Plaintiff opposes the motion, citing to *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). In *Roper*, the United States Supreme Court held that a district court's entry of judgment in favor of named plaintiffs over their objections did not moot their standing to appeal the denial of their class certification motion. *Roper*, 445 U.S. at 339. In a footnote, the Supreme Court does note that difficult questions arise as to the named plaintiffs' responsibilities to putative class member prior to class certification. *Id.* at 340, n.12. In this case, however, Plaintiff Ross Basil still has a claim for non-payment of overtime that the Court has not dismissed. Defendants have not cited any authority for the proposition that an agreement to settle an individual claim moots consideration of a motion to allow class notification under 29 U.S.C. § 216(b) prior to dismissal or judgment on that claim.[1] Therefore, Plaintiff Basil's motion to allow notification is not moot.

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[1] The case at bar is thus distinguishable from *Shores v. Sklar*, 885 F.2d 760, 762 (11th Cir. 1989) (en banc). In *Shores*, a divided United States Court of Appeals for the Eleventh Circuit did not allow a plaintiff to appeal denial of class certification after he consented to the entry of a judgment on his claims without reserving a right to appeal.

B. Motion for Notification

Turning to the merits of Plaintiff's motion to allow notification to potential class members of their rights to opt-in under Section 216(b) of the FLSA, it is settled in the Eleventh Circuit that a district court has the authority under the FLSA to issue an order requiring notice to similarly situated persons. *See Dybach v. State of Florida Dep't of Corrections*, 942 F.2d 1562 (11th Cir.1991) (noting a split in the circuits and "concluding that the 'broad remedial purpose of the Act' is best served if the district court is deemed to have the power to give such notice to other potential members of the plaintiff class to 'opt-in' if they so desire and by the district court's exercise of that power under appropriate conditions.") (citations omitted). Before determining whether to exercise such power, however, *Dybach* instructs the district court that it "should satisfy itself that there are other employees of the department-employer who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Id.* at 1567-1568. If the district court concludes that there are such other employees, the court then has the discretion to establish the specific procedures to be followed with respect to such possible opting-in. *Id.* at 1568.

Turning to the similarly situated step of the *Dybach* test, Plaintiff argues that Defendant had a company-wide policy (or at least within the southeast region) of regularly adjusting employee's hourly rates on a daily or weekly basis. The purpose of this practice is to avoid paying employees a rate of 1.5 of their regular rate for overtime hours worked in any given week. Plaintiff supports this argument with payroll records of the named Plaintiffs, as

well as deposition testimony of two of Defendant's managers. Defendant argues that notice should not be given because Plaintiff has not shown that the different types of Defendant's employees, such as licensed practical nurses and registered nurses, are similarly situated with respect to their job requirements and with regard to their pay provisions.[2]

The Court concludes that the affidavits and deposition transcripts provided by Plaintiffs are sufficient to satisfy this Court that there are other employees of Defendant who are similarly situated with respect to their job requirements and with regard to their pay provisions. It appears that there is a company-wide policy of changing hourly rates on a weekly basis.

However, as to the second step of *Dybach*, the Court agrees with Defendant that the record in this case contains no admissible evidence that any employees desire to opt-in to this action. Plaintiffs have had ample opportunity to meet this opt-in burden, since this case was filed in April, 2002. The only evidence put forth is contained in Plaintiff Maxine Cameron-Grant's affidavit filed with Plaintiffs' reply in support of their motion to allow Court notification. In that affidavit, Plaintiff Cameron-Grant states that one other employee, Sue Borah, wants to make

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[2] Defendant also asserts that the motion to allow notification is untimely, as the deadline for adding parties was set by Judge Middlebrooks for August 26, 2002. Plaintiff's motion was filed September 30, 2002. The Court gives Plaintiff the benefit of the doubt that the August 26,-2002 deadline did not apply to Plaintiff's motion to allow notification to potential opt-in class members.

a claim for back wages. Affidavit of Maxine Cameron-Grant, ¶ 3 [DE 33]. This statement of Ms. Borah's intentions is inadmissible hearsay.

Plaintiff argues that a requirement to put forth evidence that other similarly situated employees desire to opt-in to this case puts the "cart before the horse" and effectively eliminates the ability to bring a successful motion to allow court notification. The Court disagrees. The *Dybach* decision directs the district court to "satisfy itself that there are other employees of the department-employer who desire to 'opt-in' ***and*** who are 'similarly situated'. . . . " 942 F. 2d at 1567-1568 (emphasis added). The requirement that Plaintiff Basil find other employees to submit an affidavit or file a consent to be a party plaintiff is not difficult or overly burdensome. In addition, Plaintiff could have found such employees through the discovery process. This case is thus akin to *Haynes v. Singer Co., Inc.*, 696 F.2d 884, 887 (11th Cir.1983), where the Eleventh Circuit stated that "plaintiffs have the burden of demonstrating a reasonable basis for crediting their assertions that aggrieved individuals existed in the broad class that they proposed." In *Haynes*, the Court concluded that unsupported assertions that FLSA violations were widespread and that additional plaintiffs would come from other stores owned by the employer was not sufficient to authorize notice to other potential class members. Therefore, taking the record in this case as a

whole,[3] Plaintiffs have not shown that similarly situated persons are willing to opt-in to this case.

III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Plaintiffs' Motion for an Order Permitting Court Supervised Notice to Employees of their Opt-in Rights [DE 19] is hereby **DENIED**;

2. Defendant's Motion to Strike Plaintiff's Additional Information [DE 35] is hereby **DENIED**;

3. Defendant's Motion to Dismiss, or Alternatively to Strike Motion for an Order Permitting Court Supervised Notice as Moot [DE 43] is hereby **DENIED**;

4. This case remains on for Calendar Call at 10:00am on Friday, February 7, 2003, as reset by this Court's Order of January 24, 2003.

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[3] With regard to Defendant's motion to strike Plaintiffs' Notice of Filing Additional Information Received Pursuant to the Freedom of Information Act [DE 34], this information from the Department of Labor confirms Defendant's policy of changing rates of pay, and therefore supports Plaintiffs' argument regarding similarly situated employees. This information provides no support for the second prong of showing that there are other employees who desire to opt-in to the case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of February, 2003.

/s/ Kenneth A. Marra
KENNETH A. MARRA
United States District Judge

Copies furnished to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11546-JJ

ROSS BASIL,

Plaintiff-Appellant,

versus

MAXIM HEALTHCARE SERVICES, INC.,
a Foreign corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Dec. 24, 2003)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: HULL, MARCUS and STAHL*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested

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* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE